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FILED
JUL 1 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1503

In The
Supreme Court of the United States

HAROLD WILLIAM GUTCH,
Petitioner,

v.

FEDERAL REPUBLIC OF GERMANY,
a Foreign State,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Republic of Germany's prosecution in Germany of an American citizen and German resident practicing law in Germany for failure to pay income tax, and Germany's subsequent collection of said taxes in Germany, constitutes an implied waiver of sovereign immunity pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(1).

2. Whether petitioner has failed to show a true conflict among the various circuits on the standard for finding a waiver of sovereign immunity by implication, especially where any conflict would be immaterial to the outcome of the case because the Federal Republic of Germany was never properly served as is required by the Foreign Sovereign Immunities Act.

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STATEMENT OF THE CASE

I. Procedural Background

Petitioner Harold William Gutch, is a German resident, with dual German and United States citizenship. (Pet. App. B, p. 5a).[1] He filed an action in the district court for the District of Columbia against the Federal Republic of Germany seeking return of German income taxes levied in Germany against his deceased father by German tax authorities for legal work performed in Germany by petitioner's father who was a U.S. citizen and resident of Germany. Respondent moved to dismiss the case arguing that it was immune from prosecution under the Foreign Sovereign Immunities Act and that, even if not immune, it had not properly been served as required by the Foreign Sovereign Immunities Act.

The district court correctly ruled that it lacked personal jurisdiction over the Federal Republic under the Foreign Sovereign Immunity Act ("FSIA"), because petitioner did not establish subject-matter jurisdiction and because of the lack of proper service of process. *Gutch v. Federal Republic of Germany,* 444 F. Supp. 2d 1, 2 (D.D.C. 2006) (*citing Transaero, Inc., v. LaFuerza Aerea Boliviana*, 308 U.S. App. D.C. 86, 30 F.3d 148, 151 (D.C. Cir. 1994). The Court of Appeals for the

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[1] Facts set out in the district court's opinion are cited to Petitioner's Appendix B. The district court's opinion also may be found at *Gutch v. Federal Republic of Germany,* 444 F. Supp. 2d 1 (D.D.C. 2006).

District of Columbia Circuit affirmed the district court's ruling in its unpublished opinion.

II. Underlying Facts

Petitioner's deceased father, Dr. Kobre, was a United States citizen who served in the armed forces of the United States during World War II. At the conclusion of the war, he remained in Germany as a member of the allied occupation forces until 1955. He thereafter remained in Germany and practiced law. Dr. Kobre did not file German income tax returns for many years and understated his income tax liability on the German income tax returns he did file. German authorities tried Dr. Kobre in a German criminal court for tax evasion. Dr. Kobre claimed to have been a member of the Allied Forces, and that, as such, he should be immune from taxation by Germany or jurisdiction in German courts. The German criminal court in Berlin concluded, after extensive review of all the evidence presented and a seven day trial, that Dr. Kobre lost his status as member of the Allied Forces in 1955 and, like any other German resident, became subject to German taxes and to the jurisdiction of German courts. The court found Dr. Kobre guilty of income tax evasion for the period from 1957 to 1987 on February 23, 1989. Dr. Kobre never paid the income taxes and interest owed. Dr. Kobre died in November 1989 and the tax debt passed to the petitioner as an inheritance debt.[2] (Pet. App. B, p.6a-7a).

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[2] German beneficiaries are treated as having received the property directly from the decedent. Section 1922 (1) German Civil Code. Under this concept of universal succession, which can be found in

Petitioner subsequently brought a civil suit in the Tax Court for Berlin, Germany to challenge the tax debt. The tax court ruled against the petitioner, reaffirming the criminal court's finding that Dr. Kobre's special status ended in 1955 and that Dr. Kobre was liable for German taxes. The German Federal Fiscal Court, the appellate tax court in Germany, dismissed the petitioner's subsequent appeal in 1994, finding no fault in the decision of the Berlin tax court. The German Constitutional Court, Germany's highest court and the court of last resort, declined to hear the case in 1996. (Pet. App. B, p. 7a). In 1999, the European Commission on Human Rights rejected the Petitioner's appeal. (Pet. App. B, p. 7a).

REASONS FOR DENYING THE WRIT

The decisions of the district court and the court of appeals that Germany has not waived its sovereign immunity by implication are correct and as there is no mature conflict in the courts of appeals over the standard for determining if such an implied waiver of immunity exists, this Court's review is not warranted. In addition, there is no dispute that Petitioner failed to properly serve process on the Federal Republic of Germany and therefore, even if Germany had waived its sovereign immunity, the district court still has no personal jurisdiction over Germany.

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many civil law jurisdictions, the property of the decedent and his debts vest immediately. Mr. Gutch could have disclaimed the inheritance and would have not been made liable for the tax liabilities incurred by his father. He failed to do so.

Petitioner argues that the Federal Republic of Germany has waived its immunity by implication by not stopping its attempt to collect taxes from petitioner due and owing to the Federal Republic of Germany under German tax law. These allegations, even if proven, do not form the basis for a finding that Germany has impliedly waived it sovereign immunity.

The history of FSIA suggests that implicit waivers are found only in cases where a foreign state has agreed to arbitration in another country, where a foreign state has agreed that the law of a particular country should govern a contract, or where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity. *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess., p. 18, reprinted in 1976 U.S. Code Cong. & Admin. News 6604, 6617. None of these circumstances are present in this case.

The Supreme Court has directed that waivers of sovereign immunity are to be narrowly construed in favor of the sovereign. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-686 (1983), *citing McMahon v. United States*, 342 U.S. 25, 27 (1951), and *Eastern Transportation Co. v. United States*, 272 U.S. 675, 686 (1927). Thus, it is no surprise that federal courts agree that the implicit waiver exception to FSIA can only be applied under these very narrowly defined circumstances. In fact, federal courts have been virtually unanimous in holding that the implied waiver provision of Section 1605(a)(1) must be construed narrowly. *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1017 (2d Cir. 1991) (citations omitted). A foreign sovereign has not waived its immunity

unless it does so clearly and unambiguously. *See*, *World Wide Minerals, LTD. v. Republic of Kazakhstan*, 296 F.3d 1154, 1162 (D.C. Cir. 2002); *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1292 (11th Cir. 1999); *Saudi Arabian Airlines Corp. v. Tamimi (In re Tamimi)*, 176 F.3d 274, 278 (4th Cir. 1999); *Rodriguez v. Transnave Inc.*, 8 F.3d 284, 287 (5th Cir. 1993); *Joseph v. Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1022 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 378 (7th Cir. 1985) (per curiam).

Respondent Federal Republic of Germany has not waived its immunity by its effort in Germany to collect taxes due and owing to the Federal Republic of Germany against a German taxpayer and resident of Germany in accordance with the tax laws of the Federal Republic of Germany. These activities do not imply a waiver of sovereign immunity. On the contrary, enforcement of German tax laws by German tax authorities within the borders of the Federal Republic of Germany is clearly outside the implicit waiver exception envisioned by Congress and is not subject to the jurisdiction of courts in the United States.

Indeed, in the context of discussing the common law revenue rule, which stands for the proposition that courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns, U.S. federal courts have stated that, "policy complications and embarrassment may follow when one nation's courts analyze the validity of

another nation's tax laws." *European Cmty. v. RJR Nabisco*, 424 F.3d 175, 180 (2d Cir. 2005).

Petitioner mailed the complaint and summons to the Embassy of the Federal Republic of Germany in Washington, D.C. on or about December 7, 2005. (Pet. App. B, 8a). This service attempt is invalid under the Foreign Sovereign Immunities Act[3] and pursuant to Fed R. Civ. P. 12(b)(5), which petitioner conceded below. (Pet. App. B, 23a). Petitioner asked the district court for leave to properly serve Germany. (Pet. App. B, 23a). The district court denied this request in light of its holding that the Federal Republic of Germany was entitled to sovereign immunity. (Pet. App. B, 24a). Since the Court lacks personal jurisdiction over the Federal Republic of Germany, it would be futile for the Court to hear this case, as the failure to properly serve the Federal Republic of Germany is a separate and independent basis for dismissal of the lawsuit.

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[3] The methods set forth in FSIA at 28 U.S.C. §1608(a) are the sole channels through which service may properly be effected on a foreign sovereign. *Transaero, Inc.*, 30 F.3d at 154 (*citing* H.R. Rep. No. 1487 at 24, reprinted in 1976 U.S.C.C.A.N. at 6623 (Section 1608(a) "sets forth the exclusive procedures for service on a foreign state.'))

CONCLUSION

Petitioner's claim is without merit, there is no conflict in appellate authority on the scope of the implicit waiver of sovereign immunity and petitioner has failed to properly serve Germany with process. Thus, the writ should be denied.

Respectfully submitted,

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